Local loops. Local loops should be included in the minimum set of unbundled elements because they meet the statutory criteria.[42]

Local loop subelements. Unbundling of local loop subelements, such as (1) network interface device/unit, (2) loop distribution, (3) digital loop carrier/analog cross connect, and (4) loop feeder is not generally technically feasible. As Bell Atlantic points out, there are no industry standards for subloop unbundling.[43] Furthermore, such unbundling is currently impractical because a large percentage of ILEC loops are direct feeder; that is, they extend all the way from the customer's premise to the central office.[44] In these instances, there obviously is no mid-loop connection point that could be used to unbundle the loop. It is also not technically feasible to unbundle existing ILEC network interface devices; this would require establishing a separate CLEC network interface device for customer privacy and network security reasons.

Even where both feeder and distribution facilities exist, the only conceivable places for interconnecting are cross-connect boxes and vaults in the field, which are not designed to accommodate multiple interconnectors. Aside from obvious security risks, there are no

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[42] Our comments more completely describe our position on unbundling network elements. PTG at 44-47.

[43] Bell Atlantic, Albers Aff't at ¶ 19.

[44] Direct feeders account for 80 percent of all loops in Pacific Bell urban areas.

operations support systems to allow ordering, provisioning, inventory and assignment of loop sub-elements, and there is no mechanized testing capability.[45]

Local switching. Many commenters agree with our position (PTG at 54) that the provision of switching ports satisfies the Act's requirement that ILECs unbundle local switching. (*See, e.g.*, Bell Atlantic at 25; BellSouth at 41; U S West at 54-55; NYNEX at 70; GTE at 37) Unbundling the switch port is technically feasible, although further unbundling of the switch cannot be done. Indeed, "the preponderance of the switch is a shared resource which cannot be physically partitioned into discrete components dedicated to the use of a purchaser." (Sprint at 33) For example, vertical features are not network elements available for unbundling, because they are retail services that

> are not provided through discrete and separable pieces of equipment (although separate add-on equipment, in addition to the switching functionalities described below, might be required for some advanced features such as three-way calling). Rather, their functionality is embedded in both the switch software and the operation of the switch itself (*e.g.*, features are invoked by the central processing unit each time a call is set up). (Sprint at 37 (footnote omitted))

Similarly, the LDDS-proposed local calling platform is not a network element subject to unbundling:

> It appears to be nothing more than a different way of pricing at wholesale for the LEC's retail services, *i.e.*, LDDS would get exactly the same functionality and service under the platform concept as it would if it simply resold an LEC's retail service (Sprint at 38-39).

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[45] In addition, no requester has demonstrated a "need" for access to such subelements.

This reasoning applies with equal force to Sprint's suggestion (Sprint at 34) that local switching capacity -- what Sprint describes as the ability to switch calls from one line to another or from a line to a trunk -- be defined as a network element. Local switching capacity is a usage service that is currently offered in our switched access tariffs and local exchange tariffs. Allowing carriers to purchase basic local switching capacity as an unbundled element at cost plus a reasonable profit would undermine state pricing mechanisms for local usage and lead to an insidious type of arbitrage that the Act does not contemplate. (*See* Section I.D.3 below)

It is not technically feasible to provide switching capacity on an unbundled basis in any event. A CLEC customer's originating local calls cannot be routed through an ILEC's end office switch to CLEC transport trunks terminating in that end office. The switch does not have the capacity to respond to such routing requests from multiple interconnectors. As BellSouth explains:

> . . . BellSouth offers several different types of local exchange service, 1FR (residential), toll restricted service, 900 restricted service etc. Each type is called a class of service and has its own dialing plan (*i.e.*, instructions for the switch on how to handle different types of calls) that is programmed into the switch. The switch software has a finite number of classes of service that can be accommodated. Assume that a new competitor wants unbundled switching at a particular central office and wants all local calls originating in that office to be sent to trunks it terminates in that office. A dialing plan for each class of service offered by the carrier would have to be programmed into the switch. It becomes readily apparent that the ability to accommodate specific requests will depend on the number of carriers seeking arrangements within a central office and the quantity of dialing plans that would have to be programmed. There are other technical considerations that come into play that also affect the feasibility of a given request. Like other network functions, there are adjunct systems that support switching, such as recording. Any request that is inconsistent with these support systems' existing capabilities would make the

task of accommodating a request extraordinarily more complex and costly (BellSouth at 41 n.89).[46]

Transport. Dedicated and common interoffice trunks meet the statutory test for network element unbundling. Multiplexing and digital cross connects are included, where required, as part of the transport element.

Tandem/transit switching, and data switching. These elements meet the statutory unbundling test.

Operator services and directory assistance. Operator services and directory assistance are not physical network elements and, hence, need not be unbundled.[47] However, ILECs must provide access to these services on a nondiscriminatory basis pursuant to Section 251(b)(3), and BOCs have additional obligations under Section 271.

Signaling network and data bases. It is technically feasible to unbundle A-links, B-links and D-links from a link's dedicated port on our signal transfer points ("STPs"). These unbundled links are dedicated transmission facilities, and do not include the associated STP port. The STP port cannot be further unbundled from the STP, as the FCC has

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[46] There is also an additional related concern that "[t]here is no way . . . to partition the switch to prevent one co-carrier whose use of the switch exceeds the 'capacity' it purchased from interfering with the capacity available from another carrier, potentially degrading the service quality to the second carrier's customers." Bell Atlantic Albers Decl. at ¶ 27.

[47] MCI faults us for not allowing it to participate in a joint directory assistance database we provide with GTE of California. (MCI at 33, 38) This joint database is an anomaly created at the direction of California and is limited to service in Southern California. We plan shortly to ask that the database be superseded by an arrangement under which directory listings -- but not database access -- will be made available to GTE, MCI and other carriers.

acknowledged.[48] Similarly, it is not technically feasible to provide unbundled access to the service control point ("SCP").[49]

Intelligent network and advanced intelligent network. Unbundling intelligent network or advanced intelligent network (AIN) facilities is not technically feasible. As the pleadings and *ex parte* filings in Docket 91-346 make clear, unbundled AIN access creates significant risks to network integrity and security that cannot be solved through interconnection certification procedures.[50] Carrier certification would not prevent erroneous messages to the AIN database, which could, for example, improperly change a customer's presubscribed interexchange carrier (*i.e.*, "real-time, per-call slamming"). We strongly urge the Commission not to base its decision on this fact-barren record, but rather to rely on the industry intelligent network project field trials that will identify concrete issues surrounding this new technology.

Operations support systems. OSSs are not network elements for purposes of the Act because they are not used in the provision of telecommunications services. Rather, OSSs stand separate from the telecommunications network Over time, as the volume of local competition increases, it likely will make business sense -- both for ILECs and CLECs -- for automated interfaces to be developed. This is not, however, an Act requirement. The Commission should leave this subject to the negotiation process.

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[48] Ameritech Operating Companies, 1996 FCC Lexis 1494 (Com. Car. Bur., rel. March 27, 1996).

[49] PTG at 59.

[50] Intelligent Networks, 8 FCC Rcd 6813, 6815 (1993).

3. Unbundling cannot be used as a substitute for resale to evade the Act's pricing standards.

Several IXCs interpret the Act as allowing requesting carriers to purchase ILEC services as unbundled elements (at cost plus a reasonable profit).[51] The drafters of the Act did not intend to permit such arbitrage. First, the Act plainly states that a "network element" is a facility or equipment, or a feature, function or capability provided via that facility or equipment -- not a service. Second, the IXCs' interpretation would effectively make the resale provision (section 251(c)(4)) a dead letter. Requesting carriers would have every incentive to ask that all of the ILEC's telecommunications services -- many of which make substantial contribution toward keeping residential rates affordable -- be provided as unbundled network elements at cost plus a reasonable profit. This interpretation must be rejected.

E. Safe Harbors Or Preferred Outcomes For Pricing Must Reflect Sound Economic Principles And Ensure ILEC Recovery Of Costs With Due Regard For Ease Of Administrative Implementation. (NPRM ¶¶ 117-133)

The FCC's challenge in developing pricing guidelines is formidable. The Commission must ensure that its principles send correct economic signals and encourage efficient competitive entry. The Commission also must ensure that its principles allow incumbent LECs to recover the total costs of the network *they are actually* using.

As detailed below, we do not believe that the FCC can or should plunge into a hopelessly thorny thicket by prescribing detailed pricing principles and substituting itself in the places Congress reserved for private negotiations or PUC deliberations. Instead, we

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[51] AT&T at 27-28; ACSI at 40-41; CompTel at 33-34.

believe that the Commission should identify safe harbors or preferred outcomes for any negotiated agreement or PUC decisions that meets the following criteria:

- use of forward-looking incremental costs as determined by the states (a national model with the aim of prescribing "national prices" is wrong and unworkable);
- total service long run incremental cost (TSLRIC) serves as a floor for pricing;
- access charge rates serve as a price ceiling;
- these ceiling and floor standards become a benchmark against which to measure reasonable prices; and
- any state PUC that adopts cost and pricing methodologies should insure recovery of joint and common costs and a reasonable profit as well as embedded costs on a competitively neutral basis.

In view of the complexity of the issues and the time pressures facing the Commission, this approach would be consistent with the Act and promote economic, competitive entry through an administratively feasible program.

In contrast, the opening comments of AT&T and MCI seek a detailed federal prescription of pricing rules under their own rendition of TSLRIC. First, they seek to ignore or minimize the public policy and legal problems of unrecovered joint and common costs associated with TSLRIC. Second, they seek to redefine TSLRIC in critical respects and offer an untested Hatfield Model that has serious flaws. Third, they incorrectly assert that existing costs or prices cannot serve as a reasonable cost ceiling for pricing. Each of these contentions is addressed below.

1. TSLRIC and access charges constitute a range within which negotiations and subsequent state review can take place.

Pricing rules cannot ignore a very plain and basic purpose of the Act -- prices should be the product of negotiations, approved by state commissions. Some latitude for negotiation is necessary, and detailed rules that lend themselves to only one outcome will simply supplant any notion of negotiation. While general guidelines can set the boundaries for negotiations, helping speed agreements and competitive entry, strict rules that compel a single, nationwide price will engender heated controversy before regulators and the courts. This underscores an important point for the Commission -- pricing rules should facilitate negotiations, not dictate outcomes, and they should serve as a benchmark against which to test failed negotiations.

2. TSLRIC will not allow for recovery of joint and common costs.

As we and numerous other parties explained in comments, prices set at LRIC, including TSLRIC, are not compensatory. Prices set at TSLRIC would not fully recover joint, common, sunk, or capital costs.[52] Thus, any FCC pricing rules based solely upon TSLRIC would be inconsistent with the Act[53] and would violate the Constitutional prohibition against confiscatory regulation.[54]

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[52] USTA Reply Comments, Hausman Aff't.

[53] *See* 47 U.S.C. § 252(d)(1).

[54] *See, e.g.*, USTA at 36-50 and GTE at 66-72, (citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 308-310 (1989); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); Federal Power Comm. v. National Gas Pipeline Co., 320 U.S. 591, 602 (1944)).

The Act requires that interconnection and network element charges be based on cost.[55] Had Congress intended "cost" to be limited to forward-looking costs -- which would have overturned decades of judicial precedent (PTG at 65-66) -- it would have said so explicitly. Congress's concern, instead, was to avoid requiring a time-consuming nationwide rate case before interconnection could proceed.

The Commission itself has acknowledged that incremental costs "will not recover the total costs of the network."[56] TSLRIC, in fact, is never compensatory on a forward-looking basis: no mater how calculated, it does not recover joint and common costs, or a fair profit.[57] Yet, as Chairman Hundt recently said, "in adhering to the strictures of Section 251 incumbent LECs must, at the very minimum, be permitted to charge for forward-looking joint and common costs."[58]

TSLRIC may be an acceptable *starting point* for the pricing of competitive inputs. But the pricing standard cannot stop there. Pricing competitive inputs at TSLRIC would force incumbent LECs to try to recover their total costs either from the retail customers for

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[55] The reference to "rate of return or other rate based proceeding" describes a type of regulatory proceeding, not a pricing methodology. *See* S. Rep. No. 104-23, 104th Cong., 1st Sess. 21 (1995).

[56] *See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket 95-185, ¶ 48 (rel. January 11, 1996).

[57] AT&T's efforts to equate "economic cost" with "TSLRIC" is simply wrong. Baumol, Ordover, and Willig do not follow AT&T's lawyers down this primrose path. They acknowledge that TSLRIC does not recover shared or common costs, and therefore they do not equate it with "economic cost."

[58] Speech to Northwestern University, "The Telecommunications Act of 1996: Evolution Not Revolution" at 6 (May 10, 1996).

whom they are competing or from services that are required to be priced below economic cost, such as basic exchange service.

AT&T's witnesses, Baumol, Ordover, and Willig, do not respond to this scenario. In fact, they agree with this premise. They admit that "[c]ross-subsidies are common in the rate structure, and rates depart systematically from pertinent costs." (AT&T, App. E at 8) Put a different way, the testimony of Baumol, Ordover, and Willig has to be based on the assumption that *all* of the LECs' service prices, including *basic exchange*, will be allowed to reflect economic cost. If this is not allowed to happen, then pricing competitive inputs at TSLRIC will result in a major shortfall. Simply stated, if the FCC pricing rules create such a shortfall, it will strongly increase the pressure to raise basic exchange rates.

AT&T, MCI and the Department of Justice attempt to discount the dilemma facing PUCs, LECs and their customers by downplaying the amount of joint and common costs that would be unrecovered if prices were set at TSLRIC For example, they assert that "an important property of TSLRIC rates based on physical elements is that unrecovered joint and common costs are likely to be much lower than a TSLRIC standard based instead on the cost of providing services."[59] Unfortunately, they present no evidence for this assertion, which is counter-intuitive. As services are broken down into component elements, the problem of unallocated joint and common costs should generally grow, not diminish. As GTE writes:

> Assume that Nike, which manufactures shoes, is required to sell at incremental cost any component of a pair of Nike shoes. One firm may ask to purchase only left, but not right, shoes, arguing that the incremental cost of its purchase is only the raw materials (leather and rubber) required for production, but not

[59] DOJ at 32-33 (emphasis in original).

> the manufacturing plant and equipment, which would have been built and maintained by Nike anyway for its own use. Similarly, another firm may ask to purchase only right, but not left shoes, arguing it should pay only for the incremental raw materials. Finally, a third firm may ask to purchase only the legal right to use the Nike name on non-Nike-made shoes, but not any shoes themselves.
>
> Working together, the three firms can combine to sell Nike shoes that are just like those supplied by Nike, but the combined cost to the three firms will be only the raw materials and will exclude the cost of the Nike factory, the value of the Nike name, and so forth. If such pricing were mandated, Nike would rapidly cease production and sell its assets for other uses.

(GTE at 62) In the above example, costs developed at the "service" level would include costs (the plant and equipment) that are unallocable joint and common costs. Thus, the cost recovery problem is exacerbated rather than alleviated.

3. AT&T's and MCI's version of TSLRIC is theoretically wrong, and the Hatfield Model grossly understates costs.

In the end, states -- not self-interested competitors -- will need to determine the long run incremental cost of a network.[60] AT&T and MCI want to supplement this state prerogative with their own version of TSLRIC. They would: (1) spread a unit cost across "the entire demand of all uses and users of that element or group, including the demands of the ILEC itself;" (2) measure "the costs an efficient, cost-minimizing competitor would incur"[61] and, (3) "exclude all costs attributable to the ILEC's retailing operations (*e.g.*, marketing, billing)." (AT&T at 55-60 (emphasis in original))

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[60] In California, AT&T and MCI agreed that recovery of common costs "is required." CPUC Decision 95-12-016, App. C at 6 (December 6, 1995).

[61] In addition, "[t]he past architecture, sizing, technology, or operating decisions of the ILECs should not serve as bases for calculating TSLRIC." AT&T at 58.

The IXCs' first point is logically inconsistent with their second proposed principle. If, as AT&T's first point says, a unit cost considers the entire demand of all uses and users of that element or group -- that is, if all of the incumbent LECs' economies of scale should be conferred on new entrants -- then it hardly makes sense not to use the actual costs that supposedly confer the economies of scale on the LEC. But that is what the IXCs' second point requires.

Just as illogically, the IXCs assert that Commission pricing policies should ignore the fact that competitive enterprises make decisions based on the firm's costs as they actually exist, not on the costs of some hypothetical firm. LRIC "takes a firm's past history as given, does not assume that it is writing on a blank slate, but recognizes that it will ordinarily be planning the installation of new capacity, at whatever the additional investment will cost given its current situation."[62]

The IXCs' final point is also not a phenomenon of competitive markets. To exclude the costs of retailing a network element from its TSLRIC would be inconsistent with determining the TSLRIC of the same element based on "the entire demand of all uses and users of that element or group." As every first year business student is taught, firms should not recover less margin from wholesale inputs they sell to competitors than from the retail products they sell to compete with these competitors -- the practical effect of requiring retail costs to be excluded from TSLRIC. To do so would confer on the firm's competitors profit

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[62] Bell Atlantic Comments, Kahn Aff't, "The Necessary Conditions of Effective Competition for Local Transport," Amendment of Part 69 Allocation of General Support Facility Costs, CC Docket No. 91-141 (filed August 6, 1991). *See also* USTA Reply Comments, Hausman Aff't.

margin that derives from the firm's own efficiencies (or in other words, would burden the firm's retail products with an unnatural cost disadvantage).

AT&T's and MCI's "Hatfield Model, Version 2.2" attempts to implement their own version of TSLRIC. The attached empirical work of Mr. Richard L. Scholl details the numerous flaws in the Hatfield Model. (Appendix B) Not surprisingly, the model grossly understates costs. In its current form, it could have no application as a "national model" if for no other reason than it neither bears any relationship to actual LEC networks nor to actual costs of placing and operating those networks. More fundamentally, the latest version of the Hatfield model has never been tested by the states to learn exactly how far off the mark it really is. No state would (or could) use the model as any measure of reasonable costs or rates until it had an opportunity to examine the reasonableness of the model, and its results, in the context of actual, local telephone company costs. What is more, the Administrative Procedure Act prohibits the FCC from adopting any rule or guideline based on a model where significant elements of the model were not available at the time comments in this proceeding were due to be filed. (5 U.S.C. § 706(2)(E))

With minor exceptions, the flaws that we pointed out in our comments remain in the Model unchanged:

- Hatfield underestimates Pacific Bell's cash operating expenses required to provide basic exchange by about $1.3 billion annually,[63] out of $7.6 billion annual revenues, by applying erroneous factors to incremental investments and by picking and choosing the costs to be included.

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[63] Opening Testimony of Richard L. Scholl at 11, California Universal Service Proceeding, R.95-01-021/I-95-01-021 (April 17, 1996).

- Other costs are simply ignored, e.g., by omitting all costs of directory assistance (DA) operators, Hatfield underestimates DA costs associated with subscriber loops by more than $100 million per year.

- Hatfield understates total loop investment by about $3.6 billion annually.

- Hatfield builds not an "optimal" network from the perspective of final customers, but a bare bones network that is designed to be "optimal" for large IXCs, e.g., it assumes a fiber and digital network that will not exist for at least another decade, excluding existing loop, switch, and interoffice investment in current technologies.

- Hatfield also contends that the incumbent LECs' networks are padded with inefficiencies, but no objective evidence of such "inefficiencies" exists.[64]

If the ILECs are not now configured as "optimal" new entrants would be, it reflects a fundamental fact about public utility regulation. ILECs have been required to be ready to serve end users on short notice and have sufficient capacity (U S West, Harris & Yao Aff't at 20) to meet regulators' low network blocking expectations.

4. The cost proxy model developed and tested in California is far superior to the Hatfield Model.

The attached empirical work of Dr. Richard E. Emmerson provides an alternative to the Hatfield Model. (Appendix C) Dr. Emmerson explains how the cost proxy model ("CPM") operates, how it corrects the many problems inherent in the Hatfield approach, and the general results its produces. The model increases prices for loops by 70% or more above what Hatfield predicts. It is, in every aspect, a more accurate depiction of long run

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[64] According to 1993 ARMIS reports, the overhead factor, which includes costs such as corporate expenses, for all RBOCs was 13.4%. Hatfield slices this by 25%, and uses a 11.6% overhead factor (in his latest version, which he now calls "variable support"). However, the ARMIS overhead factor for AT&T was 17.7%. So much for the LEC's "inefficiencies."

incremental costs actually incurred by LECs in providing local networks than the Hatfield model.

While the CPM is a dramatic improvement over the Hatfield approach, it is premised to some extent on an optimal network. As is true with any engineering model, it looks to and employs the best forward-looking technology and network design. It does take as a given the actual location of switches (both end offices and tandems), and it can be used by any state to estimate long run costs, both for unbundled elements and for universal service funding to support basic exchange services. *We are not, however, holding it out as a national model other states must follow.* We greatly encourage any state to test the model against the state's own local conditions, understand how it operates and gauge the reasonableness of its results against known, actual operating circumstances and costs. Having done so, we are thoroughly convinced the model will "sell itself," and prove to be a highly useful tool to state regulators who know and understand its application. It will be entirely unnecessary to dictate that it be used anywhere and everywhere, "come hell or high water," and without regard to knowing the reasonableness of its results in any specific state. The CPM supported by Dr. Emmerson is a correct and important step in the right direction, and we invite both the FCC and the states to test its veracity and accurateness. In contrast, mandating an untested, hypothetical set of costs founded on the Hatfield model is a step in the wrong direction.

5. Safe harbors or preferred outcomes for state PUC pricing policies that are within a zone of reasonableness will best serve the Act's goals.

As detailed above, TSLRIC is simply not an acceptable basis for Section 251 pricing. However, TSLRIC can serve as an appropriate lower boundary when used in combination with other tools designed to recover joint and common costs. AT&T and MCI, of course, oppose any and all recognized methodologies advocated for ILECs that allow recovery of those costs (ECPR, Ramsey, etc.) -- even when the methodologies are applied only on a forward-looking basis.

The Commission has a fundamental decision to make. Its options are (a) to leap into the details of pricing with a federal prescription binding all states and all carriers, or, (b) to establish a range of pricing outcomes within which the state PUCs are afforded a measure of discretion to adapt to local conditions. With only another 50 days left before action must be taken, the Commission has to choose between guessing about the right details or trusting its state counterparts to fulfill their responsibilities under the Act.

We strongly suggest that the appropriate approach here will be to signal an approval of ranges that can serve as a benchmark within which the negotiating parties and states can best resolve the thorny issues of recovering joint and common costs. This is an entirely logical solution because state commissions already have had substantial experience in

implementing TSLRIC pricing principles and they have better fact-finding resources (trial-type hearings, discovery, work shops, et al.) at their disposal.[65]

The discretion of the state PUCs can be guided by a TSLRIC pricing floor and a ceiling based upon current access charge rates. Within this range, the PUCs can adopt pricing principles best tailored to ensure competitive entry and the ILECs' recovery of total costs. States can also make sure their individual universal service needs are met. This combination of federal guidelines and state PUC implementation would be fully consistent with the carefully defined federal-state relationships envisioned in the Act.

While IXCs challenge the use of current rates as a cap, there is no reason why current rates cannot serve as acceptable proxies for competitive pricing inputs until LECs are allowed to engage in rate rebalancing. First, as long as there is parity between what the incumbent charges competitors and itself, the most efficient provider in a market will have the most competitive final prices. The Act already provides for this form of imputation. Section 272(e)(3) of the Act requires RBOCs "to charge the [RBOC's interLATA affiliate], or impute to itself (if using the access for its provisions of its own services), an amount for access to its telephone exchange service and exchange access that is no less that the amount charged to any unaffiliated interexchange carriers for such service." Second, existing rates already have been scrutinized and determined to be just and reasonable. In addition, our rates are subject to price cap regulation, which deters any cost-shifting from unregulated to

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[65] California at 11. Failure to adopt a safe harbors approach is also highly disruptive if it tosses out the window the two years of work that have gone into developing the California interconnection program.

regulated services, severely constrains shifts in the allocation of joint and common costs with baskets, bands, sub-bands, and even sub-sub-bands, and gives LECs incentives to increase efficiencies in ways that using actual costs for interconnection would not. Third, as we have argued in our comments and elsewhere in these reply comments, rules that cause prices for competitive local exchange products to deviate substantially from the rates for analogous services would lead to uneconomic arbitrage -- that is, differences in demand for services that are unrelated to differences in cost and function -- and diminished support for universal service. Under these circumstances, a policy of allowing state PUCs to pursue the best path to cost recovery within FCC defined ranges of acceptable outcomes is sensible and workable.

F. The Rulemaking Record Provides Clear Legal And Policy Guidance For The Resolution Of Issues Concerning Interexchange Services, CMRS And Neighboring LECs Under Section 251, and Relief for Rural Carriers. (NPRM ¶¶ 158-171)

1. Section 251 does not create an access charge loophole for interexchange carriers. (NPRM ¶¶ 164-165)

There is almost unanimous agreement with our request that the Commission consider reforms to its current access charge regime.[66] Most parties also agreed that the Commission's goal of a competitive marketplace would not be served by creating pricing anomalies between interconnection pricing and the pricing and costing of access charges. (U S West at 60-61) The Commission should therefore act decisively in two areas: (1) implement the Act immediately so as to avoid manipulation and harmful arbitrage; and

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[66] Parties requesting access charge reform include interexchange carriers, LDDS/WorldCom Comments at 66; MCI Comments at 82-83; ILECs, Bell Atlantic at 11-12; Bell South at 63; SBC at 95; USTA at 52; US West at 63-64; CLECs, TW Comm at 55-56; and state regulators, Florida at 35; Texas at 35.

(2) begin a comprehensive review of access reform and universal service to create a common model for interconnection. (BellSouth at 63)

The comments also confirm that the Act does not include interexchange services within the scope of Section 251, despite the IXCs' argument that they have the right to cost-based interconnection and unbundled network elements under Section 251.[67] The record shows that: (1) as a matter of plain statutory language, IXCs do not *offer* exchange access, and, therefore, they are not eligible for Section 251 interconnection;[68] (2) Section 251(g) and the Act's legislative history preserve the Commission's access charge regime, which would be undercut by cost-based IXC access;[69] (3) applying Sections 251 and 252 to interexchange access would grant the states jurisdiction over interstate communications, in contravention of Section 2 of the 1934 Act;[70] and (4) allowing IXCs cost-based access to unbundled network elements would allow them indirectly and unlawfully to avoid access charges.[71]

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[67] *See* CompTel at 50-51; MCI at 59-60; LDDS/WorldCom at 68-70.

[68] GTE at 74-79; *see also* Bell Atlantic at 9; BellSouth at 60-63.

[69] *See also* Bell Atlantic at 9; US West at 60

[70] *See also* Oregon at 12.

[71] *See also* Bell Atlantic at 10-11; Ameritech at 26

2. The record confirms that CMRS providers are requesting carriers for the purposes of Section 251. (NPRM ¶¶ 168-169)

Several parties discuss whether CMRS providers are "requesting telecommunications carriers" whose interconnection arrangements fall within the scope of Section 251(c)(2).[72] We agree with the Commission that "CMRS are within the definition of 'telecommunications services' in section 3(46) of the 1934 Act . . . because they are 'offered for a fee directly to the public,'" and that CMRS providers are telecommunications carriers within the meaning of Section 3(44) because "they are 'providers of telecommunications services.'"[73] Finally, the Commission has already opined that CMRS services may fall within the definition of "telephone exchange service." The Commission recognized in its recent wireless local loop rulemaking that local exchange service delivered by radio link may be provided using architectures consisting of mobile, fixed or a combination of these components . . . ."[74]

Since CMRS providers fit the definition of "requesting telecommunications carriers," the provisions of Sections 251 and 252 apply to LEC-CMRS interconnection arrangements and related functions. These provisions specify that "requesting telecommunications carrier[s] . . . ha[ve] the duty to negotiate in good faith the terms and conditions of

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[72] California at 34; Oregon at 33; BellSouth at 63; NYNEX at 22-23; and AT&T at 43-44.

[73] NPRM, ¶ 168.

[74] Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services, WT Docket No. 96-6, *Notice of Proposed Rulemaking*, 11 FCC Rcd 2445 (1996), ¶ 5.

[agreements for interconnection or related functions]."[75] Because such agreements must adhere to each of the provisions of Sections 251(b) and (c) if the CMRS provider is negotiating with an ILEC, CMRS-LEC interconnection agreements must provide for reciprocal compensation under Section 251(b)(5) and meet all the other requirements of the foregoing sections.

Section 332 does not alter this conclusion, contrary to the urgings of several commenters.[76] That Section has nothing to do with regulation of the rates LECs or CMRS providers charge other providers for interconnection.[77] Instead, Section 332 governs rates CMRS providers charge their *end users*. Prices, terms and conditions for interconnection with ILECS are governed by Section 251, regardless of the technology used to provide local exchange service.[78] Commenters who urge the Commission to carve out exceptions for divergent technologies[79] ignore the spirit of the 1996 Act, which seeks competitive parity regardless of technology.[80]

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[75] 47 U.S.C. § 251(c)(1).

[76] *See* AMTA at 5; Arch at 12-15; AT&T at 42-44; PCIA at 4-7; Vanguard at 13-18; CTIA at 2-6; and Sprint at 70.

[77] Section 332(c)(3) governs rates charged by CMRS providers to end users, not LEC rates. 47 U.S.C. § 332(c)(3).

[78] *See also* USTA at 66-67; NYNEX at 23; Oregon at 33; Florida at 36; NARUC at 21; National Wireless Resellers Association at 9-10.

[79] *See* CTIA at 1-2.

[80] To the extent the Commission or commenters propose to impose Section 251 obligations on CMRS providers who are the recipients of requests for interconnection, (continued...)

3. Existing LEC/LEC agreements connect non-competing carriers and are therefore irrelevant to Section 251(c) interconnection. (NPRM ¶¶ 170-171)

Agreements between ILECs and non-competing neighboring LECs are not agreements between an ILEC and a requesting telecommunications carrier "pursuant to section 251."[81] Such agreements also fail the Section 251 requirement that they be for the "transmission and routing of telephone exchange service . . . *within the carrier's network.*" (47 U.S.C. § 251(c)(2)(B) (emphasis added)).[82] Section 251 and 252 were plainly intended to apply to competing carriers, and not to the longstanding relationships between neighboring LECs that are not competing in the same geographic area.[83]

4. CLECs must not be allowed to cherry pick the most favorable terms from preexisting agreements.

Section 252(i) does not permit requesting carriers to pick and chose the most favorable provisions among various agreements.[84] "A contract must be construed as a whole and the intention of the parties is to be collected from the entire instrument and not

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[80](...continued)
such obligations are only appropriate where the CMRS providers furnish services which are equivalent to wireline local exchange services.

[81] 47 U.S.C. § 252(a)(1).

[82] *See also* USTA at 67-68; MI Exchange Carriers Assoc. at 56; NYNEX at 25-26; and Rural Telephone Coalition at 16.

[83] USTA at 68. To the extent that the relationship between ILECs changes to become competitive, those new competing carriers may have agreements subject to the Act. *See* SBC at 53-54.

[84] USTA at 96-97; Ameritech at 98; GTE at 83; MI Exchange Carriers Assoc. at 72.

from detached portions."[85] Wrenching individual contract terms out of context, and giving them global application, would ignore the trade-offs inherent in any complex negotiation and agreement. Permitting an interconnector to pick and choose will make ILECs much less willing to negotiate individualized agreements when those terms must ultimately be made available to all potential interconnectors. Consequently, Section 252(i) should be interpreted to require that entire agreements be made available to any other telecommunications carrier willing to accept *all* of the same terms and conditions.[86]

5. Section 251(f)(2) permits LEC operating, not holding, companies with fewer than 2 percent of the nation's subscriber lines to file for state waivers of the interconnection requirements. (NPRM ¶¶ 260-261)

AT&T argues that Section 251(f)(2) only permits a LEC to request exemption from Section 251(b) or (c) interconnection obligations if the LEC has "fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide" (47 U.S.C. § 251(f)(2)), *determined at the holding company level.* (AT&T at 91-92) The Act does not permit such a reading. The term "local exchange carrier" simply means "any person that is engaged in the provision of telephone exchange service or exchange access." (47 U.S.C. § 153(26)). It is the operating company, not the holding company, that actually provides telephone exchange service or exchange access.

AT&T is attempting to insert an "affiliation" standard into this section that simply is not there. Elsewhere in the Act, Congress clearly knew how to include "affiliation"

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[85] Williston on Contracts § 620 (3d ed. 1960).

[86] USTA at 96-97; Ameritech at 98; BellSouth at 81.

standards when it wanted to apply a provision to a "LEC and its affiliates." (*See, e.g.*, 47 U.S.C. § 632) Therefore, Section 251(f)(2)'s 2 percent threshold should only be applied to individual operating companies, not holding companies.

AT&T also has asked the Commission to require that a petitioning LEC demonstrate under Section 251(f)(2) that the requirements of the Act would inflict "substantial harm" on the LEC and its customers and that a state commission "narrowly tailor" any suspension of the rules to address the particular harm the state finds to exist. (AT&T at 92-93) Section 251(f)(2)(A) imposes no such requirements. Rather, it contains a specific standard for the state to follow in making such a suspension decision, a standard that requires no further federal guidance.

G. Establishing Safe Harbors Or Preferred Outcomes Can Provide Guidance That Will Ensure That Resale Is Properly Implemented Through Carrier Negotiations And State Decisions. (NPRM ¶¶ 172-177)

1. The Act permits reasonable restrictions on resale. (NPRM ¶¶ 174-175)

Section 251(c)(4) imposes on ILECs the duty "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations" on resale.[87] AT&T and MFS read this section as prohibiting *any* restriction on resale of a retail service offered to subscribers other then the customer class restriction. (AT&T at 79-80; MFS at 69-70) The plain language of the statute, however, shows otherwise.

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[87] The Act contains an exception to the general prohibition against unreasonable limitations where a state imposes a restriction on resale so that a service offered at retail to one class of customers cannot be resold to customers of another class. *See* 47 U.S.C. § 251(c)(4)(B).

Section 251(c)(4) clearly prohibits an outright ban on resale. But it just as clearly permits limitations and conditions on resale, so long as they are not "unreasonable and discriminatory." If AT&T's and MFS's arguments were correct, the terms "unreasonable and discriminatory" would have been replaced by the word "any."[88]

The new statutory injunction against unreasonable restrictions on resale tracks the existing Section 201(b) prohibition against common carriers engaging in unreasonable practices. Accordingly, the Commission's body of precedent on IXC resale policies developed to implement Section 201(b) has direct relevance to guidelines for compliance with Section 251. The interpretative rulings issued over the past two decades for AT&T[89] and other common carriers[90] can be properly used to define what constitutes an unreasonable limitation; conversely, the rulings identify various types of reasonable limitations as well.[91]

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[88] The subsection prohibits unreasonable and discriminatory resale limitations "except that" a state may impose customer class restrictions. This exception, in context, clearly indicates that Congress believed that the customer class exception could have been found to be unreasonable and that it needed to specifically exclude this type of limitation from the category of unreasonable and discriminatory limitations in order to remain legal.

[89] Resale and Shared Use Decision, 60 FCC 2d 261 (1976), *modified on other grounds*, 62 FCC 2d 588 (1977), *aff'd*, AT&T v FCC, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978).

[90] *See, e.g.*, Resale of Switched Services, 83 FCC 2d 167, 193 (1980); Cellular Systems, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58, *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed*, United States v. FCC, No. 82-1526 (D.C. Cir., Mar. 3, 1983).

[91] *See, e.g.*, Cellular Resale Order, 7 FCC Rcd 4006, 4008 (1992) (determining that cellular carrier need not permit fully operational facilities-based competitor to resell its services).